

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:)
)
SOUTH OF THE BORDER, INC.,) Bankruptcy Case No. 98-32101
)
Debtor.)
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)
THE OFFICIAL PLAN COMMITTEE)
OF SOUTH OF THE BORDER, INC.,)
)
Plaintiff,)
)
vs.) Adversary Case No. 00-3138
)
BRINKERS MANUFACTURING JEWELERS,)
)
Defendant.)

OPINION

This matter having come before the Court for trial on an Amended Complaint filed by Plaintiff on January 17, 2001; the Court, having heard sworn testimony and arguments of counsel and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

Findings of Fact

1. On July 7, 1998, an involuntary case under Chapter 11 of the United States Bankruptcy Code was commenced against the Debtor Corporation, South of the Border, Inc.

2. Subsequent to July 7, 1998, Debtor Corporation consented to the entry of an Order for Relief, which was entered on August 21, 1998.

3. A Chapter 11 Plan of Liquidation was confirmed by the Court in this case.

4. Under the terms of the confirmed Chapter 11 Plan of Liquidation, the Official Plan Committee of South of the Border, Inc. has authority to commence and prosecute actions to avoid certain transfers under Chapter 5 of the United States Bankruptcy Code.

5. On January 13, 1998, Debtor Corporation issued Check No. 1007, payable to Brinkers Manufacturing Jewelers, Inc. (Brinkers), in the amount of \$10,000. On February 18, 1998, Debtor Corporation again issued Check No. 1143, in the amount of \$5,000, to Brinkers. On March 19, 1998, Debtor Corporation issued Check No. 1027, in the amount of \$2,575, to Brinkers, and, finally, on July 3, 1998, Debtor Corporation issued Check No. 1079, in the amount of \$3,000, to Brinkers.

6. The foregoing payments were made from assets of the Debtor Corporation, South of the Border, Inc.

7. Defendant, Brinkers, sold jewelry to Michael Frierdich, Sr., an officer and shareholder of South of the Border, Inc.

8. The payments noted above were not made for the benefit of the business of South of the Border, Inc.; rather, the obligations that were paid were incurred by Michael Frierdich, Sr. to pay for personal jewelry purchases he made.

9. At trial, the Defendant admitted that the payment made on July 3, 1998, in the amount of \$3,000 was drawn from the Debtor Corporation's checking account following the filing of the instant bankruptcy proceeding. As such, said payment was avoidable as a post-petition transfer under 11 U.S.C. § 550.

10. It is clear from the evidence that the Debtor Corporation, South of the Border, Inc., received nothing in exchange for any of the

above-referenced payments in that the Debtor Corporation did not sell or otherwise use jewelry in the operation of its business of 13 Taco Bell franchise restaurants.

11. The payments dated January 13, 1998, February 18, 1998, and March 19, 1998, as referenced above, were made within one year prior to the filing of the involuntary petition, as well as within one year of the entry of the Order for Relief under Chapter 11.

12. Throughout the years 1997 and 1998, the Debtor Corporation routinely did not have the funds necessary to pay its debts as they became due, including debts for food purchases, taxes, and franchise fees.

13. The Defendant stipulated at trial that the Debtor Corporation was insolvent at the time of the payments referenced above.

14. The evidence at trial clearly established that, at the direction of Michael Frierdich, Sr., the bookkeeper for South of the Border, Inc. paid various personal expenses of Michael Frierdich, Sr. with Debtor Corporation funds. These expenses included the jewelry purchases noted above, various living expenses, and the purchase of a boat and a car. This was in addition to providing Michael Frierdich, Sr. with monthly payroll checks.

15. The representative of the Defendant, Brinkers, who made the jewelry sale to Michael Frierdich, Sr. had known Michael Frierdich, Sr. for approximately twelve years, and prepared an invoice which indicated on its face that the purchaser of the jewelry in question was Michael Frierdich, Sr.

16. The Defendant, Brinkers, is located in the State of Indiana,

and Michael Frierdich, Sr. resided in the State of Indiana, but also maintained an Illinois address for various purposes.

17. The Defendant, Brinkers, and Michael Frierdich, Sr. used the Illinois office address of South of the Border, Inc. as the address of Michael Frierdich, Sr. on the jewelry purchase invoice to avoid payment of Indiana sales tax on the purchase.

Conclusions of Law

At trial, the Defendant admitted that the transfer of \$3,000 made from the Debtor Corporation to Defendant on July 3, 1998, was a post-petition transfer made by the Debtor Corporation without authority under the Bankruptcy Code or order of the Court; thus, making the transfer avoidable pursuant to 11 U.S.C. § 550. Based upon this admission and the clear authority under § 550, the Court concludes that judgment in the amount of \$3,000 under Count I of the Amended Complaint should be entered in favor of the Plaintiff and against the Defendant.

Count II of the Amended Complaint seeks to avoid transfers made on January 13, 1998, February 18, 1998, and March 19, 1998, totalling \$17,575, as fraudulent transfers under 11 U.S.C. § 548, which states:

(a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily -

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

The facts, as outlined above, clearly show that the payments in question, under Count II of the Amended Complaint, were made by the Debtor Corporation to Defendant, Brinkers. These payments represented transfers of the property of Debtor's estate, *i.e.* money, and the Debtor did not receive anything in exchange for the transfers. The payments were made by the Debtor Corporation to Brinkers for debts that were incurred by Michael Frierdich, Sr. to purchase jewelry for his current wife and not for South of the Border, Inc. The facts clearly establish that South of the Border, Inc. did not receive any benefit from the payments made to Brinkers, the Debtor Corporation never purchased any jewelry from Brinkers, nor did the Debtor Corporation sell jewelry in the operation of its Taco Bell restaurants. It was stipulated by the parties at trial that South of the Border, Inc. was insolvent at the time the transfers were made. Based upon the facts adduced at trial and the clear statement of the law under 11 U.S.C. §§ 548(a)(1)(A) and (B), the Court concludes that the transfers made between January 13, 1998, and March 19, 1998, as alleged under Count II of the Amended Complaint are avoidable as fraudulent transfers, and

that judgment should enter on Count II of the Amended Complaint in favor of the Plaintiff in the amount of \$17,575.

ENTERED: March 15, 2001.

/s/ GERALD D. FINES
United States Bankruptcy Judge